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« Previous | Next »

[Daily Environment Report: News Archive](#) > [2014](#) > [February](#) > [02/11/2014](#) > [News](#)

Drinking Water

Suit Claims 'Collective Dereliction' of Duty By West Virginia Agencies in Elk River Spill

Feb. 10 — West Virginia agencies charged with safeguarding public health committed “collective dereliction” of duty by failing to prevent the Elk River chemical spill, according to a lawsuit filed on behalf of affected citizens (Covenant House v. Huffman, W. Va., No. 14-0112, 2/7/14).

An emergency petition filed Feb. 7 with the West Virginia Supreme Court of Appeals accuses the state's Department of Environmental Protection and the Department of Health and Human Resources of failing to perform their mandatory duty to protect citizens from exposure to hazardous materials.

The original action, filed by Mountain State Justice and Appalachian Mountain Advocates on behalf of two nonprofit groups, comes in response to the Jan. 9 spill of 4-methylcyclohexane methanol (MCHM) into the Elk River, which prompted a week-long “do not use” drinking water order for 300,000 people in nine counties ([08 DEN A-13, 1/13/14](#)).

The agencies violated their clear legal duty to protect human health, said the petition, which seeks a writ of mandamus ordering them to perform their duties as stipulated under state law.

Warnings Ignored

The complaint said that despite several clear warnings, West Virginia residents in the Kanawha Valley were at imminent risk of toxic exposure, and respondents refused to take the actions necessary to protect the public health and the environment. The complaint asks the court to order the agencies to take specific steps to remedy past regulatory failings.

These steps include implementation of a hazardous chemical release prevention program as

recommended by the U.S. Chemical Safety and Hazard Investigation Board, an immediate requirement that all permits for drinking water providers include source water protection plans and emergency response plans, and monitoring of public health impacts from the chemical spill, including human and environmental impact studies.

The petitioners also want WVDEP to require regulated facilities to submit groundwater protection plans and stormwater pollution prevention plans prior to issuing or renewing National Pollutant Discharge Elimination System permits, and to perform regular facility inspections.

Soon after the leak was discovered at a Freedom Industries chemical storage facility upstream from the Charleston area's drinking water uptake, the WVDEP said no permits were on file for the operation, because none were required, and that agency inspectors had not visited the site in more than 20 years.

Precedent for Action

A writ of mandamus is appropriate because no other adequate remedy is available to compel the agencies to comply with statutory requirements, the complaint said.

Without such action, they will continue to violate established laws by failing to ensure prevention of chemical spills, emergency planning and information sharing, it said.

In the past, the court has issued writs of mandamus against these agencies for failing to enforce similar public health measures set forth in the West Virginia Medical Waste Act and the West Virginia Solid Waste Management Act, according to the complaint, which further asks the court to expedite the case in the interest of public safety.

The petitioners are two nonprofit groups, Covenant House and the West Virginia Coalition Against Domestic Violence, which serve disadvantaged individuals.

Covenant House said, in a prepared statement, "Our system has failed us," adding that while everyone in the area was affected, the spill disproportionately impacted low-wage earners and the homeless.

WVDEP Secretary Randy Huffman and DHHR Secretary Karen Bowling are named as respondents in the petition.

Neither agency responded to Bloomberg BNA's request for comment on the lawsuit.

Water Safety Questions Remain

At a congressional field hearing into the spill Feb. 10, Chemical Safety Board Chairman Rafael Moure-Eraso said regulators should limit where chemical storage facilities are built or operated.

Preliminary research by the CSB's investigators suggests a gap in regulations for above-ground storage tanks, he said, adding, "urgent steps are required to significantly improve the safety of

facilities that handle hazardous chemicals.”

Moure-Eraso told the Charleston hearing that this is the CSB's third accident investigation in the Kanawha Valley since 2008.

Following the earlier two, the CSB recommended that Kanawha County, working with the state, establish a hazardous chemical release prevention program to enhance safety and optimize emergency response.

The CSB also recommended that the health department establish an industrial safety authority, paid for by fees assessed on the companies processing or handling potentially dangerous chemicals, he said.

State and local authorities said they considered the recommendations, but due to a number of reasons, including funding, they were not adopted, Moure-Eraso said.

Although West Virginia lifted the “do not use” order after a week, residents have continued to complain about the licorice odor associated with the coal-cleaning chemical and have expressed fear about long-term health effects from consuming tap water.

At the congressional hearing, Jeff McIntyre, president of West Virginia American Water, said, “Just because you smell something doesn't mean it's not safe.”

Water supplied by the utility has levels of 4-methylcyclohexane methanol that are deemed safe by the U.S. Centers for Disease Control and Prevention, he said.

Gov. Earl Ray Tomblin (D) convened a panel of federal experts Feb. 6 to assure West Virginians that the water is safe, saying he himself is drinking it ([25 DEN A-13, 2/6/14](#)).

However, Sen. Jay Rockefeller (D-W.Va.) said, in a written statement Feb. 7, he doesn't think the water is safe to drink because the CDC termed the water “appropriate” for use, rather than “safe.”

After 50 years of public service, and seeing the way corporations influence government, “even if some expert group told me it was safe, I don't think I'd believe it,” Rockefeller said. The “appropriate” designation “means absolutely nothing,” he said. “It means, ‘It's up to you.’ If I were told it was ‘appropriate,’ I just wouldn't drink it.”

Rockefeller, along with fellow West Virginia Sen. Joe Manchin (D) and Sen. Barbara Boxer (D-Calif.), chairman of the Senate Environment and Public Works Committee, is sponsoring the Chemical Safety and Drinking Water Protection Act of 2014 (S. 1961), intended to help prevent similar incidents from happening in the future ([see related story](#)).

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